

No. 47861-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

POPE RESOURCES, LP and OPG PROPERTIES, LLC

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

**BRIEF OF AMICUS CURIAE CITY OF SEATTLE,
CITY OF TACOMA, CITY OF BELLINGHAM and
WASHINGTON ASSOCIATION OF MUNICIPAL ATTORNEYS**

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Table of Contents

I. STATEMENT OF INTEREST.....	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT.....	2
A. Owners or operators are liable whether “innocent” or not.	2
B. DNR’s arguments belong in the allocation phase of the trial.....	3
C. Local governments should not pay DNR’s share.	4
D. Government liability was limited, not eliminated.	6
E. Ecology is entitled to deference.....	7
F. The Court should confirm that DNR is not exempt from liability under the statute.....	8
IV. CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES

<i>Akzo Coatings, Inc. v. Aigner Corp.</i> , 909 F.Supp. 1154 (N.D.Ind.1995) ...	5
<i>City of Seattle v. WSDOT</i> , 98 Wn. App. 165, 175 (Div. II).....	5
<i>Dash Point Vill. Assoc. v. Exxon Corp.</i> , 86 Wn. App. 596, 607, 937 P.2d 1148 (1997).....	4
<i>PacifiCorp Envtl. Remediation Co. v. Wash. State Dept of Transp.</i> , 162 Wn. App. 627, 665-66, 259 P.3d 1115 (2011).....	4
<i>State ex rel. Pirak v. Schoettler</i> , 45 Wn.2d 367, 371-72, 274 P.2d 852 (1954).....	10
<i>State v. Pomeroy</i> , 68 Wash. 389, 391, 123 P.514 (1912)	8

STATUTES & REGULATIONS

1989 Session Laws, ch.2, §2	2, 8
RCW 70.105D.010(2).....	1, 2
RCW 70.105D.010(5).....	2
RCW 70.105D.020(22).....	7
RCW 70.105D.020(26).....	8
RCW 70.105D.040.....	8
RCW 70.105D.040(2).....	2
WAC 173-340-200.....	5

OTHER

2015-2016 Proposed Budget – City of Seattle, http://www.seattle.gov/city-budget/2015-16-proposed-budget	7
69 FR 63149-50	10

I. STATEMENT OF INTEREST

The purpose of the Model Toxics Control Act (MTCA) is, in part, to eliminate threats that “in many cases are beyond the financial means of our *local governments and ratepayers*” to address. RCW 70.105D.010(2) (emphasis added). DNR contends MTCA was drafted with the intent of exempting DNR and the State from liability in order to protect state taxpayers. Nothing in the statute indicates that intent. DNR’s interpretation would shift the cost of remediating state land to local taxpayers and ratepayers, in direct contravention of the statutory policy to relieve local governments and ratepayers from paying to clean up contamination they did not cause. That would be an erroneous reading of the statute and unjust to local governments.

II. STATEMENT OF THE CASE

The City of Seattle, City of Tacoma, City of Bellingham and Washington Association of Municipal Attorneys, collectively the “Local Governments,” respectfully adopt the Statement of the Case set forth in Appellants’ Opening Brief.

III. ARGUMENT

A. Owners or operators are liable whether “innocent” or not.

Ideally, the party that caused contamination is identifiable. Then the “polluter pays” the bulk of the cleanup costs. But, the origin of contamination often cannot be identified after decades of commercial activity and mixing that naturally occurs in a water body. Only the property owners or operators are known. Under those circumstances, each owner or operator is “strictly liable, jointly and severally, for all remedial action costs.” RCW 70.105D.040(2). Joint and several liability attaches to owners and operators, whether or not they had anything to do with causing the contamination, because, “[I]t is essential that sites be cleaned up well and expeditiously.” 1989 Session Laws, ch.2, §2, now codified as RCW 70.105D.010(5).

DNR resists application of this statutory framework to itself, *repeatedly* asserting that holding it liable would be “unfair” to the taxpayers. *See* Br. at 1, 10, 12, 15, 22, 24, 26, 27. Yet, the express purpose of MTCA is to assist “local governments and ratepayers,” not the state. RCW 70.105D.010(2).

B. DNR's arguments belong in the allocation phase of the trial.

After liability is established, the trial court has broad discretion to consider "equitable factors" in allocating financial responsibility among the liable parties. *Dash Point Vill. Assoc. v. Exxon Corp.*, 86 Wn. App. 596, 607, 937 P.2d 1148 (1997). The factors considered by the court generally include "the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste," "the degree of care exercised by the parties with respect to the hazardous waste," and any "additional factors" the court deems relevant. *PacifiCorp Envtl. Remediation Co. v. Wash. State Dept of Transp.*, 162 Wn. App. 627, 665-66, 259 P.3d 1115 (2011).

A liable party "may be required to pay complete response costs, or may not be required to pay any response costs, or may be required to pay some intermediate amount," depending on the court's equitable assessments. *City of Seattle v. WSDOT*, 98 Wn. App. 165, 175 (Div. II), quoting *Akzo Coatings, Inc. v. Aigner Corp.*, 909 F.Supp. 1154 (N.D.Ind.1995). In *City of Seattle v. WSDOT*, this Court ruled that WSDOT was a liable party but that no costs should be assigned to WSDOT under the particular circumstances of that case. *Id.*

The “allocation” stage of a trial is precisely the platform for DNR to argue that its role was minimal or that the tax burden would be unfair. The trial judge gets to decide, with the benefit of a developed factual record and live witnesses. MTCA reflects this two-step process, carefully balancing the assignment of broad liability to expedite cleanups and a just division of costs among the liable parties.

C. Local governments should not pay DNR’s share.

Pollutants do not respect property boundaries. When Ecology identifies a remediation “site,” it often includes multiple tax parcels with different owners because the site boundaries are determined by the extent of contamination.¹

Local governments frequently own aquatic land or have operations on aquatic land in close proximity to DNR aquatic land. For example, in the City of Seattle there are street ends that extend into Elliott Bay along the waterfront. DNR owns adjacent properties. If Ecology identified a contaminated site that included a City street end and adjacent DNR property, then, if the party that caused the contamination could not be identified, the City and DNR would share costs for remediating the site,

¹ The definition of a “Site” includes any, “area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located.” WAC 173-340-200.

even if neither of them caused the contamination. But, if DNR has its way, the City would be left paying the entire cost of remediating the site, including the part that is DNR land.

Cities and counties would have to shoulder more than their fair share, because DNR would be shouldering less. This, in turn, means less money for all the other responsibilities of local governments, such as:

- Keeping people safe;
- Regulating development;
- Providing drinking water and other utility services;
- Providing health and human services; and
- Supporting the arts and recreation.

See, e.g., 2015-2016 Proposed Budget – City of Seattle, <http://www.seattle.gov/city-budget/2015-16-proposed-budget> (last visited February 1, 2016). MTCA was intended to relieve local governments of unfair financial burdens for cleanups, not impose them.

Forcing local governments to finance cleanup of DNR land would be especially unjust when DNR leased its land to parties that would undoubtedly release contaminants, such as sawmills (this case), wood treating operations (Pacific Sound Resources), and paper mills (Port Angeles Harbor). DNR chose its tenants and must live with the results.

D. Government liability was limited, not eliminated.

MTCA did not ignore issues of governmental liability. The statute limits the liability of state and local governments under specific circumstances.

The term [owner or operator] does not include:

- (i) An agency of the state or unit of local government which acquired ownership or control through a drug forfeiture action under RCW 69.50.505, or involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title.

1989 Session Laws, ch.2, §2, now codified as RCW 70.105D.020(22).² The drafters certainly could have gone further—including in the exemption “state-owned lands” or “lands acquired at statehood,” but they did not. The intent was that state agencies—like DNR—should have their liability *limited*, not foreclosed.

Limiting, but not eliminating governmental liability makes sense. Exempting DNR or any governmental entity entirely would place excessive liability elsewhere, such as other public agencies, the private sector, or the Department of Ecology (which must address “orphan sites”). A foundational principle of statutory construction is that legislative policy

² DNR does not contend that it fits within this exemption.

determinations must be upheld by the courts unless constitutional limits are violated. *State v. Pomeroy*, 68 Wash. 389, 391, 123 P.514 (1912) (“It is fundamental that, with the wisdom or unwisdom, the policy or impolicy of the enactment, within constitutional limits, the Legislature is supreme.”) DNR can certainly seek an outright exemption through the legislative process—which would be subject to public comment and considered through the lens of competing objectives—but it is not entitled to one by judicial fiat.

E. Ecology is entitled to deference.

Ecology regularly names DNR a “potentially liable party,” meaning that Ecology finds “credible evidence” of DNR’s “*liability* under RCW 70.105D.040.” *See* RCW 70.105D.020(26) (emphasis added). For example, Ecology named DNR a potentially liable party (PLP) at these sites:

- Whatcom Waterway (2007)
- Commencement Bay (2012)
- Western Port Angeles Harbor (ongoing)
- Port Gamble (ongoing)
- R.G. Haley (ongoing)

Under Ecology’s long-standing interpretation of MTCA, DNR is liable as an owner or operator. “When a statute is ambiguous, the construction

placed upon it by the officer or department charged with its administration, while not binding on the courts, is entitled to considerable weight in determining the intention of the legislature." *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 371-72, 274 P.2d 852 (1954).

What is more, the "persuasive force of [the agency's] interpretation is strengthened when the legislature, by its failure to amend a statute, 'silently acquiesces' in the administrative interpretation. " *Id.*, at 372. Our legislature has acquiesced for decades in Ecology naming DNR a potentially liable party due to being an owner or operator of aquatic land. Even DNR has acquiesced in being a liable party as an owner or operator. For example, DNR settled claims against it under MTCA that were based on DNR's ownership of aquatic land at the Pacific Sound Resources site: *Proposed Administrative Settlement Pursuant to CERCLA*, 69 FR 63149-50 (describing DNR's settlement of claims under MTCA at the Pacific Sound Resources site), available at: <https://federalregister.gov/a/04-24244>.

F. The Court should confirm that DNR is not exempt from liability under the statute.

Local governments are subject to MTCA even when they are "innocent" of causing contamination and their taxpayers will be burdened paying for cleanup. MTCA was crafted that way, Ecology enforces it that way, and courts apply it that way. DNR is not treated differently from any

other governmental entity. The Court should confirm that DNR is not exempt from the statute, and remand for further proceedings consistent with the holding.


IV. CONCLUSION

The Court should reject DNR's argument and confirm that DNR is not exempt from liability under MTCA.

DATED this 10th day of February, 2016

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Also signing on behalf of the Washington Association of Municipal Attorneys, the City of Bellingham and the City of Tacoma.

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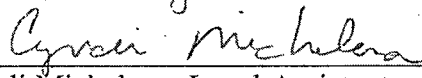
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of February, 2016.


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